No. 89-1392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

– against –

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the State of New York
120 Broadway
New York, New York 10271
(212) 341-2240

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

SUZANNE M. LYNN
Assistant Attorney General
Chief, Civil Rights Bureau
(Counsel of Record)

SANFORD M. COHEN
Assistant Attorney General

Attorneys for Petitioner
The State of New York

(For Further Appearances See Reverse Side of Cover)

VICTOR A. KOVNER
Corporation Counsel
of the City of New York
100 Church Street
New York, New York 10007
(212) 566-3800

LORNA BADE GOODMAN
Assistant Corporation Counsel
Chief, Affirmative Litigation Division

GAIL RUBIN
Assistant Corporation Counsel
Assistant Chief, Affirmative Litigation Division

Attorneys for Petitioners
The City of New York and
The New York City Health and
Hospitals Corporation

No. 89-1392

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,

Petitioners,

– against –

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners submit this supplemental brief pursuant to Sup. Ct. R. 22.6 to bring to the Court's attention an opinion recently rendered by the court of appeals for the First Circuit in *Commonwealth of Massachusetts v. Secretary of Health and Human Services*, No. 88-1279 (1st Cir. March 19, 1990).

In an *en banc* decision with one dissent, the First Circuit struck down the precise regulations challenged herein on statutory and constitutional grounds. Thus, a direct conflict now exists between two courts of appeals as to the validity of 42 C.F.R. §§ 59.2 through 59.10, a conflict which petitioners urge this Court to resolve. *See* Sup. Ct. R. 17.1(a).

Counseling and Referral Requirements

Holding that the right of reproductive choice necessarily includes the ability to make a fully informed decision, the First Circuit ruled that the provisions of § 59.8, which prevent pregnant women from receiving complete information concerning their options, violate that right. Slip op. at 29-50. The First Circuit noted that *City of Akron v. Akron Reproductive Health Services*, 462 U.S. 416, 442-47 (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 763-65 (1986), stand for the proposition that an unfettered dialogue between the physician and patient is central to the woman's privacy right. Slip op. at 31-34. The regulations' prohibition of any discussion of abortion and mandated referral to providers "that promote the welfare of mother and unborn child" regardless of the woman's medical needs or wishes, place the physician in an "undesired and uncomfortable straightjacket", *Akron*, 462 U.S. at 445 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976)), compelling him or her to be the unwilling conduit for the government's propaganda. *Id.* Government intrusion designed to discourage pregnant women from choosing abortion by requiring the physician to dispense misleading and incomplete information is an impermissible means of furthering a government policy favoring childbirth over abortion. Slip op. at 34.

The First Circuit correctly understood that the regulations go far beyond a mere refusal to subsidize abortion services. *Cf. Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980). The government may refuse to subsidize pregnancy counseling and referral services as a whole, since such a decision would leave the woman no worse off than she was before. But structuring funded counseling and referral services so as to mislead a woman into not choosing abortion creates an affirmative obstacle to the exercise of her right and leaves her worse off than she was before. Slip op. at 43-44. In contrast, the Second Circuit, while recognizing that the regulations "may hamper or impede women in exercising their right of privacy",

found that the "practical effect" of the regulations was "constitutionally irrelevant" [55a].[1]

The First Circuit also held that the abortion counseling and referral restrictions contained in § 59.8 contravene the First Amendment in that they are content-based and viewpoint-discriminatory. Slip op. at 56-57. Declaring that the counseling and referral requirements "slant the content of the relevant counseling in an 'antiabortion' direction", the court of appeals noted that such distortion is particularly egregious because the women served by Title X projects are particularly vulnerable to misinformation. Slip op. at 52. In contrast, the Second Circuit found that the counseling and referral requirements did not require "[a]rgumentation pro or con as to the advisability of an abortion" and thus were not viewpoint-discriminatory [59a].[2]

Separation Requirement

Having examined the contemporaneous and subsequent legislative history of Title X, as well as the language of the statute, *see* 42 U.S.C. § 300a(a), the First Circuit struck down the separation requirement contained in § 59.9, holding it violative of the congressional intent underlying Title X. Slip op. at 16-17.[3] In contrast, the Second Circuit ignored the clearly expressed legislative policy in support of integration of Title X

---

[1] The First Circuit also pointed out that the definition of "project funds" in § 59.2, which cover privately-generated funds of Title X projects as well as Title X funds themselves, created an unconstitutional condition on independently funded activities. Slip op. at 44, 48. The Second Circuit ignored this critical point [58a]. *See* petition for certiorari at 13 n.9.

[2] Similarly, the First Circuit found the ban on abortion-related advocacy contained in § 59.10 to be viewpoint-discriminatory, a question the Second Circuit ignored.

[3] The court of appeals also stated, alternatively, that the separation requirement was violative of the First Amendment because of the stringent burdens it imposed on Title X grantees. Slip op. at 56 n. 13.

programs with other medical services, and held that § 59.9 was based on a "valid construction of the statute" [52a]. The Second Circuit also found § 59.9 constitutional [57-58a].

In sum, a clear conflict has emerged between two courts of appeals concerning the legality of the challenged regulations. This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 341-2240

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

SUZANNE M. LYNN
Assistant Attorney General
Chief, Civil Rights Bureau
(Counsel of Record)

SANFORD M. COHEN
Assistant Attorney General
Attorneys for Petitioner
The State of New York

VICTOR A. KOVNER
Corporation Counsel
of the City of New York
100 Church Street
New York, New York 10007
(212) 566-3800

LORNA BADE GOODMAN
Assistant Corporation Counsel
Chief, Affirmative Litigation Division

GAIL RUBIN
Assistant Corporation Counsel
Assistant Chief, Affirmative Litigation Division

Attorneys for Petitioners
The City of New York and
The New York City Health and
Hospitals Corporation